Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

OCTOBER TERM, 1993

THOMAS FRANCIS GEPFRICH, Petitioner,

v.

MARJORIE LOIS GEPFRICH; JAMES FOX MILLER and MILLER & SCHWARTZ, P.A., Respondents

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO: 89-22892-BKC-AJC

In Re THOMAS FRANCIS GEPFRICH, Debtor

MEMORANDUM DECISION SUSTAINING OBJECTION
AND SUPPLEMENTAL OBJECTION TO EXEMPTIONS
Filed July 6, 1990

THIS MATTER was tried on March 1, 1990, continued over to April 3, 1990, in Miami, Florida, upon the creditor's Objection to Exempt Property and Supplemental Objection, which was joined into by the Trustee. The Court having heard the testimony, examined the evidence presented, observed the candor and demeanor of witnesses, considered the arguments of counsel, and being otherwise fully advised in the premises, it is therefore

ORDERED AND ADJUDGED that

1. This Court has entered Findings of Fact and Conclusions of Law in Adversary No.: 89-0433-BKC-AJC-A, concerning the debtor's purchase of the annuity from First Colony Life

Insurance Company, which is claimed exempt. For the reasons set forth in those Findings and Conclusions, the Court finds that the objection to exemption is sustained as to this annuity.

2. * * *

3. The debtor has also claimed as exempt his proceeds under a stock purchase agreement referred to as deferred compensation. These are monies due to the debtor from Ambassador from the sale of his Heritage stock. The debtor claims that these proceeds are wages as he alleges that the stock purchase agreement is intertwined with his employment agreement with Ambassador.

4. The evidence is undisputed from a review of the debtor's tax returns, that he receives two different forms of compensation from Ambassador. One form of compensation is treated clearly as wages, which constitutes compensation under the employment agreement. This is listed as wages on his tax returns. The other form of compensation is under the

stock purchase agreement. This is treated by the debtor on his income tax returns as installment sale income. The debtor is bound by his tax returns and cannot now claim the stock purchase proceeds as wages. Therefore, the objection to this exemption is sustained.

DONE AND ORDERED at Miami, in said District, this the 6th day of July, 1990.

A. JAY CRISTOL
United States Bankruptcy Judge

* * * * * * *

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO: 89-22892-BKC-AJC

In Re THOMAS FRANCIS GEPFRICH, Debtor

ORDER DIRECTING TURNOVER
Filed July 6, 1990

THIS CAUSE came on to be heard on April 3, 1990, in Miami, Florida, upon the Trustee's Application for an Order Directing Debtor to Turnover Property to Trustee, and

the Court having heard argument of counsel and being otherwise fully advised in the premises, it is therefore

ORDERED AND ADJUDGED that

1. The Court has entered a separate Order sustaining the objections to the exemptions claimed by the debtor as to the annuity policy purchased by the debtor on the date of filing bankruptcy through First Colony Life Insurance Company, the debtor's right to receive monies under a stock purchase agreement dated March 18, 1987, and a wage account. By that separate Order, the Court has determined that these assets are not exempt.

2. The debtor shall turnover to the Trustee, forthwith, the original annuity policy number 1518193 purchased through First Colony Life Insurance Company, together with all payment received under that annuity since the date of filing, together with the proceeds of the wage account in the sum of $922.00. The debtor shall also turnover to the Trustee

all monies received under the stock purchase agreement dated March 18, 1987, since the date of filing, together with the proceeds of the wage account in the sum of $922.00.

DONE AND ORDERED at Miami, in said District this 6th day of July, 1990.

A. JAY CRISTOL
United States Bankruptcy Judge

* * * * * * *

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO: 89-22892-BKC-AJC

In Re THOMAS FRANCIS GEPFRICH, Debtor

ORDER ON MOTION TO COMPEL AND ENTRY OF FINAL JUDGMENT AGAINST THOMAS GEPFRICH
Filed December 7, 1990

THIS CAUSE came on to be heard on November 119, 1990, in Ft. Lauderdale, Florida, upon the Trustee's Motion to compel directed to Thomas Francis Gepfrich and the Court having heard testimony of the debtor and

the Trustee having requested the entry of a judgment, and the Court being otherwise fully advised in the premises, it is therefore

ORDERED AND ADJUDGED that

A. The Trustee's Motion to compel turnover of the original annuity policy is rendered moot, based on the debtors turnover of that annuity at the previous hearing on November 5, 1990.

B. The Court hereby enters sanctions against the debtor in the amount of $500.00, to reimburse the Trustee for attorneys fees incurred as a result of the debtors failure to turnover the original annuity policy at an earlier date.

C. The Trustee's Motion to compel turnover as to the monies received post petition in the amount of $25,000.00 and the wage account in the amount of $922.00, is hereby denied in part however, the Court finds that the Trustee is entitled to a judgment against the debtor in these amounts.

D. The Court hereby enters judgment

against Thomas Francis Gepfrich in the amount of $25,922.00, representing the amounts collected by the debtor post petition under the stock purchase agreement and the value of the wage account, together with attorneys fees awarded as set forth above, for a total judgment of $26,422.00. Judgment is hereby entered in favor of the Trustee and against Thomas Francis Gepfrich in this amount, for all of which let execution issue.

DONE AND ORDERED at Miami, in said District, this the 7th day of December, 1990.

A. JAY CRISTOL

United States Bankruptcy Judge

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO: 89-22892-BKC-AJC

In Re THOMAS FRANCIS GEPFRICH, Debtor

ADV. NO. 89-0433-BKC-AJC-A

THOMAS FRANCIS GEPFRICH, Plaintiff/
CounterDefendant

v.

MARJORIE LOIS GEPFRICH, JAMES FOX MILLER, and MILLER & SCHWARTZ, P.A., a Florida Professional Service Corporation, Defendants/Counter-Plaintiffs

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FINAL JUDGMENT
Filed July 6, 1990

THIS MATTER having come before this Court on April 3, 1990 at 1:30 o'clock P.M., on the continued trial in this cause, and in conformity with the Findings of Fact and Conclusions of Law entered contemporaneously with this Final Judgment, it is hereby

ORDERED AND ADJUDGED that the Debtor, THOMAS FRANCIS GEPFRICH, is denied discharge

of his debts pursuant to 11 U.S.C. Section 727(a)(2).

DONE AND ORDERED in Miami, Florida, on this 6th day of July, 1990.

A. JAY CRISTOL

United States Bankruptcy Judge

* * * * * * *

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO: 89-22892-BKC-AJC

In Re THOMAS FRANCIS GEPFRICH, Debtor

ADV. NO. 89-0433-BKC-AJC-A

THOMAS FRANCIS GEPFRICH, Plaintiff/
CounterDefendant

v.

MARJORIE LOIS GEPFRICH, JAMES FOX MILLER, and MILLER & SCHWARTZ, P.A., a Florida Professional Service Corporation, Defendants/Counter-Plaintiffs

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FINDINGS OF FACT AND CONCLUSIONS OF LAW
FILED JULY 6, 1990

THIS MATTER having come before this Court on April 3, 1990 at 1:30 o'clock p.m., on the bifricated (sic) trial in this cause, on the Defendant/Counter-Plaintiffs, JAMES FOX MILLER, MILLER & SCHWARTZ, P.A., n/k/a MILLER, SCHWARTZ & MILLER, P.A., (hereinafter referred to as "MILLER") and MARJORIE LOIS GEPFRICH's (hereinafter referred to as "wife") counterclaims objecting to the discharge of the Plaintiff/Counter-Defendant, THOMAS FRANCIS GEPFRICH, (hereinafter referred to as "Debtor"), under 11 U.S.C. Section 727(a)(2) and after considering the argument of counsel, the evidence submitted, the credibility and demeanor of the witnesses, and the testimony of the witnesses, the Court makes the following findings of fact and conclusions of law:

The Debtor filed his petition for relief under Chapter 7 of the United States Bankruptcy Code on June 13, 1989 at 2:27 p.m. At the time of the filing, the Debtor was insolvent in that his liabilities exceeded his

assets and he was not paying his debts as they matured. In fact the Debtor had been insolvent since May 1989.

A Final Judgment of Dissolution of Marriage was entered on the 26th day of February, 1986 which obligated the Debtor to MARJORIE LOIS GEPFRICH for child support and alimony. The state court judge in the Final Judgment of Dissolution of Marriage, found that Mrs. Gepfrich was in need of alimony and child support, as well as reasonable attorney fees. The state court decided not encumber the marital assets which included but were not limited to: Debtor's pension and profit sharing plan, a Hatteras yacht, 50% ownership interest in Heritage Quality Construction Co., Inc. and a Mercedes Benz automobile. This was done so that the Debtor would be permitted maximum flexibility to pay the financial obligations required of him under the final judgment. The Debtor and his wife were ordered to take each and every reasonable and necessary action, and to conduct themselves in

such a manner as to carry out the intent and purposes of the final judgment.

At the time of the filing of his petition in bankruptcy, the Debtor owed $200,000.00, plus an arrears of at least $20,000.00, to his wife. Additionally, the Debtor owed MILLER, the divorce attorney for MARJORIE LOIS GEPFRICH, the sum of $59,148.55 since 1986 and had not paid any sums toward the obligation since 1986.

After the Debtor defaulted under his obligations to his wife, on April 21, 1989 a hearing was conducted on the wife's Petition to Compel Payment of Lump Sum Alimony. At the contested hearing on the matter, the state court entered its order dated May 29, 1989 wherein the Court determined:

> At the time of the hearing in this matter, the Husband had sold his interest in Heritage Construction, disposed of his pension and profit sharing plan, sold his Hatteras yacht, sold his Mercedes Benz automobile, built and disposed of one (1) single family residence and at present, is living in a Two Hundred Seventy Five Thousand Dollar home encumbered by a first mortgage

> of Two Hundred Forty Thousand Dollars. The record also reflects other various asset transfers by the Husband during the approximate three (3) years from the entry of the final judgment. Due to the nature of the final judgment allowing the Husband maximum flexibility in which to utilize the assets for payment to the wife, the Court finds that the Husband, after disposing of the majority of the marital assets, failed to pay the wife the monies due her. In addition, the Husband had, pursuant to the record, at least One Hundred Thousand Dollars, in discretionary spending which he used for the purchase of stocks, a new home, and gifted approximately Fifteen Thousand Dollars to his children by a prior marriage.
>
> 7. The Court specifically finds that the Husband did not act in the spirit and intent of the Final Judgment in this matter despite the fact that each party was ordered to take each and every reasonable and necessary action and conduct themselves in such manner as to carry out the intent and purpose of the Final Judgment.

The state court concluded that the Debtor was ordered to pay to the former wife by May 21, 1989, the sum of One Hundred Seventy Thousand Dollars which was the sum due, as principal, under the final judgment. If the Debtor failed to comply with the order the

Court said it would consider, upon proper application from the wife, any remedies to compel payment including but not limited to appropriate contempt orders if available. The state court order of May 25, 1989 was affirmed by the state appellate court.

It was also at this hearing that the Debtor, through its agents, represented to the state court that he had $50,000.00 from the sale of his interest in Heritage Quality Construction, Inc. However, this sum was in the form of a certificate of deposit and was held as collateral with Ambassador Savings and Loan Association and could not be reached until at least September 1989.

After the Debtor failed to make the payment of the $170,000.00 to his former wife, the Debtor sought the advice from his bankruptcy counsel, Samuel Heller, Esquire. The Debtor learned from Mr. Heller that if he were to file a bankruptcy petition he would lose his interest in the $50,000.00 certificate of deposit to the Trustee and

creditors of this estate. The Debtor was advised that the only possible way of protecting the $50,000.00 would be to get the sum released from the bank and convert same into an annuity.

When it became apparent to the wife that the Debtor was not going to honor the state court order for payment she filed a Motion for Contempt and Sanctions against the Debtor and set the matter for hearing on June 13, 1989 at 3:00 p.m. The Debtor fearing he may be incarcerated for his failure to pay any sums as ordered contacted the representative of the bank and an insurance salesman recommended by his bankruptcy attorney for the purpose of converting the $50,000.00 certificate of deposit to an annuity.

On the day of tho scheduled contempt hearing in state court the Debtor succeeded in cashing in the certificate of deposit at a penalty and having the net proceeds of $49,012.09 issued in a cashier's check made payable to himself. Then, at a prearranged

meeting at his bankruptcy counsel's office with the insurance salesman, Mr. Williams, the Debtor endorsed the check over to First Colony Life Insurance Company. The Debtor gave the check to Mr. Williams who in turned delivered the check to First Colony Life Insurance Company's agent, E. Donald Fuerst, whose office is located in Fort Lauderdale, Florida.

Mr. Fuerst did not have banking authority and could not negotiate the check which he received about 1:50 p.m. on June 13, 1989, so by federal express at the close of business that day, he mailed the application made by the Debtor for the annuity and the cashier's check to First Colony Life Insurance Company's home office in Lynchburg, Virginia. Thus, the check was not negotiated until after the Debtor had filed his petition in bankruptcy at 2:27 p.m. on June 13, 1989.

The Debtor has claimed the annuity he purchased as exempt under Florida Statute 222.14 in this proceeding. It is with this background of these facts that the wife and

MILLER seek to have this Court deny the discharge of the Debtor for his transfer of $49,012.09 into an annuity with the intent to delay, hinder, or defraud creditors pursuant to 11 U.S.C. 727 (a)(2). The Debtor admits that one of the reasons he put the money into an annuity was to ensure that his wife and MILLER would not b able to collect against this money.

As a general rule the conversion of nonexempt assets into exempt assets is allowable. In fact both the House and Senate Reports validate this approach by stating the following: "As under current law, the debtor will be permitted to convert nonexempt property into exempt property before the filing of the bankruptcy petition. This practice is not fraudulent as to creditors, as it permits the debtor to make full use of the exemptions to which he is entitled under the law.. H.R. Rep. 95595, 95 Cong., lst Sess. 361 (1977); S. Rep. No. 95-989, 95 Cong., 2nd Sess. 76 (1978).

These comments were made in view of the federal exemptions which are more limiting than the exemptions provided under Florida Statute 222.14 which is unlimited as to amount. This general rule has limits as the conversion of nonexempt assets into exempt must be made prior to the filing and not made with the intent to defraud creditors. Where the nonexempt property is converted either post petition or is tied to a claim of a specific creditor, then the debtor's conduct will be objectionable under 11 U.S.C. 727 (a)(2). See In re Reed, 700 F.2d 986 (5th Cir. 1983); In re Mehrer. 2 B.R. 309 (Bankr. WA 1980); In re Collins. 19 B.R. 874 (Bankr. M.D. Fla. 1982); In re Ford. 773 F.2d 52 882 (4th Cir. 1985) and In re Smiley. 864 F.2d 562 (7th Cir. 1989).

The Court finds that the property being converted by the Debtor was proceeds of the 50% ownership interest in Heritage Quality Construction, Inc., which was a marital asset. It is clear the wife had an interest in this

asset at the time of the dissolution of marriage and the state court specifically entrusted this assets[sic], as well as others, to the Debtor to allow him maximum flexibility to utilize the assets to pay the alimony obligations required under the final judgment to the wife and MILLER.

After entry of the final judgment the Debtor began liquidating the majority of the marital assets and failed to pay the wife or MILLER. This was done even when the Debtor had at least $100,000.00 in discretionary spending which he used for a new home, stocks, gifts of $15,000.00 to his children by a previous marriage and the $50,000.00 certificate of deposit.

This Court follows those decisions which have denied a debtor's discharge which found extrinsic fraud such as where there was a diversion of business assets into exempt property or where borrowed monies are placed into exempt property. See In re Reed, 700 F.2d 986 (5th Cir. 1983); In re Mehrer, 2 B.R.

309 (Bankr. WA 1980); In re Collins, 19 B.R. 874 (Bankr. M.D. Fla. 1982); In re Ford, 773 F.2d 52 882 (4th Cir. 1985); In re Smiley, 864 F.2d 562 (7th Cir. 1989). Here, after considering the amounts involved, the timing, the fact that the proceeds were derived from marital assets the wife had an interest in, the misleading impression given to the wife and the state court as to the availability of the certificate of deposit and the insolvency of the Debtor clearly supports the conclusion that the Debtor's actions, in converting the certificate of deposit into the annuity, were done with the requisite fraudulent purpose to hinder, delay and defraud the wife and MILLER. For the Court to conclude otherwise would set the precedent to allow parties obligated under marital decrees to convert all of the marital properties into annuities or exempt property to avoid the obligations called for under such decrees.

The Debtor argues that the prior ruling of In re Blum, 41 B.R. 816 (Bankr. S.D. Fla.

1984) should govern this case. In Blum the Court stated the mere act of converting property into exempt property, without more is not prohibited by the Bankruptcy Code. Here the facts and circumstances are clearly distinguishable from those presented in Blum.

The Court also concludes that the transfer into the annuity was not completed prior to the filing of the bankruptcy petition.

The Court follows the Uniform Commercial Code and those decisions which hold that the transfer of a check occurs when the check is honored by the bank. Fitzpatrick v. Philco Finance Corp., 491 F.2d 1288 (7th Cir. 1974) and In re Sims Office Supply, Inc., 18 B.C.D. 1006 (Bankr. M.D. Fla. 1988).

Here it is clear the check could not have been negotiated until it was received by the home office of First Colony Life Insurance Company in Lynchburg, Virginia, which was not until June 14, 1989, the day after the filing of the petition in bankruptcy. Thus, the

transfer was an improper post petition transfer clearly made with the intent to delay, hinder and defraud not only the former wife and MILLER, but also the Trustee.

Consequently, a separate judgment will be entered in this adversary in accordance with these findings of fact and conclusions of law.

Dated: July 6, 1990

A. JAY CRISTOL

United States Bankruptcy Judge

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IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO: 89-22892-BKC-AJC

In Re THOMAS FRANCIS GEPFRICH, Debtor

ADV. NO. 89-0465-BKC-AJC-A

DANIEL L. BAKST, Trustee

v.

THOMAS FRANCIS GEPFRICH, Defendant

FINAL JUDGMENT
Filed July 6, 1990

In conformity with the Findings of Fact and Conclusions of Law of even date, it is hereby

ORDERED AND ADJUDGED

A. Judgment is hereby entered in favor of the Trustee, Daniel L. Bakst against the debtor/defendant, THOMAS FRANCIS GEPFRICH. The debtor's purchase of an annuity from First Colony Life Insurance Company in the amount of $49,012.09 is hereby avoided as a post-petition transfer pursuant to 111 U.S.C. Section 549 or in the alternative, as a fraudulent transfer pursuant to 11 U.S.C. Section 548.

DONE AND ORDERED at Miami, Florida, this 6th day of July, 1990.

A. JAY CRISTOL

United States Bankruptcy Judge

* * * * * * *

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO: 89-22892-BKC-AJC

In Re THOMAS FRANCIS GEPFRICH, Debtor

ADV. NO. 89-0465-BKC-AJC-A

DANIEL L. BAKST, Trustee

v.

THOMAS FRANCIS GEPFRICH, Defendant

FINDINGS OF FACT AND CONCLUSIONS OF LAW
FILED JULY 6, 1990

THIS CASE was tried by the Court on March 1, 1990, continued over to April 3, 1990, in Miami, Florida. The Court having heard the testimony, examined the evidence presented, observed the candor and demeanor of witnesses and considered the arguments of counsel, and being otherwise fully advised in the premises, does hereby make the following Findings of Fact and Conclusions of Law:

The Trustee, DANIEL L. BAKST, filed an Amended Complaint Objecting to Discharge and

to set aside fraudulent transfer, as well as a further amendment to add a count under Section 549. The Court has entered separate findings and conclusions concerning the objection to discharge. The debtor has filed an answer raising several affirmative defenses. The issue to be determined is whether the Trustee can set aside the debtor's purchase of an annuity as a fraudulent transfer under 11 U.S.C. §548, or as a post-petition transfer under 11 U.S.C. §549.

Many of the facts in this case are undisputed. In 1987, the debtor sold stock in a company known as Heritage Quality Construction Company, Inc. The stock was sold to Ambassador Real Estate Equities Corporation. Out of the proceeds of sale, $100,000.00 was placed into a certificate of deposit at Ambassador Savings and Loan Association. The debtor had a one-half interest in these proceeds. The other one-half interest belonged to another stockholder, Ronald Blum. Although the funds were

allegedly subject to a lien in favor of Ambassador until September, 1989, the lien was released on the morning of June 13, 1989, and the debtor took his one-half interest in the funds and purchased an annuity. The actual check received from Ambassador was used to purchase the annuity in the amount of $49,012.09, which represented the proceeds from the certificate of deposit less a penalty for early withdrawal.

The debtor filed his voluntary petition under Chapter 7 at 2:27 P.M. on June 13, 1989. The debtor had to file his petition before 3:00 P.M. that day in order to avoid a hearing in State Court on a motion to hold him in contempt filed by his ex-wife, Marjorie Gepfrich. The debtor had a fear of going to jail and filed bankruptcy in order to avoid this hearing and also the monetary obligations owed to his ex-wife and her attorneys. The debtor testified that bankruptcy was the only option he had to relieve himself from enforcement of a lump sum alimony award that

he was unable to pay.

In June, 1989, the debtor sought the advice of Samuel Heller, his bankruptcy counsel. The first meeting with Mr. Heller was on June 7, 1989. The subject of annuities was discussed. The debtor was well aware that he would lose his one-half interest in the certificate of deposit if he filed bankruptcy, and that if he placed it into an annuity, he could claim the annuity as exempt. There is a conflict in testimony of the debtor concerning the date that he first contacted Steve Eppel at Ambassador concerning a release of the lien on the certificate of deposit. In an affidavit filed with the Court to support his Motion for Summary Judgment, the debtor stated that he and Mr. Blum had already. had informal discussions with Mr. Eppel long before the bankruptcy and that Eppel told the debtor and Blum in May 1989 that Ambassador would release the lien pledge whenever they wanted it. The debtor later recanted that testimony at the time of trial, which is also contrary to the

testimony of Blum and Eppel. The Court has considered this inconsistent testimony in determining the credibility of Mr. Gepfrich, who waited until the second day of trial to change his testimony from that contained in an affidavit filed with the Court several months prior.

The debtor was able to easily obtain the funds from Ambassador on the morning of June 13, 1989. The check was taken to Samuel Heller's office for a meeting which had been set up with Sam Williams. Sam Williams had been referred to Mr. Gepfrich by Mr. Heller. Mr. Williams is a certified financial planner with a life insurance license. Mr. Williams testified that he was a broker for First Colony Life Insurance Company in Virginia, as well as other life insurance companies.

Mr. Williams was aware that the debtor had problems with his ex-wife. He had been told that the debtor was planning to file bankruptcy that same day, and that the policy had to be in force on June 13, 1989. The

meeting took place in Samuel Heller's office around 12:00 noon on June 13, 1989. Mr. Williams left the office sometime before 1:50 p.m. The application is dated 1:05 p.m. with a special request that the policy be dated June 13, 1989. These notations are in the handwriting of Sam Williams.

Mr. Williams then left Samuel Heller's office to go to the office of Douglas Fuerst, a general agent for a number of life insurance companies, including First Colony Life Insurance Company of Virginia. His office is in Ft. Lauderdale, Florida. Douglas Fuerst testified that the first time he learned of the annuity was on the morning of June 13, 1989, at approximately 11:00 a.m., when he was contacted by Sam Williams who stated that he needed a policy that day. Both Sam Williams and Douglas Fuerst testified that this was an extraordinary request, and that they had never before handled this type of unusual request.

A facsimile was sent by Sam Williams to Samuel Heller from the office of Douglas

Fuerst at approximately 1:50 P.M. Douglas Fuerst testified that he was out to lunch from approximately 1:00 to 2:00 P.M. There is no direct facsimile from Douglas Fuerst to Samuel Heller. Douglas Fuerst did testify that he called his home office to see if he could date the policy the same date that he received the money. He also testified that he had no authorization to deposit the check on behalf of First Colony Life Insurance Company of Virginia. A copy of the check and application was not telecopied to the home office until 3:11 P.M. on June 13, 1989, which was after the filing of the bankruptcy petition. The actual check and original application were not deposited into the mail until after 5:00 P.M. on June 13, 1989, when they were sent by overnight delivery to First Colony Life Insurance Company in Virginia. The check mailed was the third party check from Ambassador made out to Thomas Gepfrich, and endorsed over to First Colony Life Insurance Company of Virginia. The policy was not

physically issued until June 15, 1989, and was not delivered to the debtor until sometime after June 20, 1989.

Douglas Fuerst testified that had the check not cleared, the policy would have been cancelled. The only reference to the June 13, 1989 date on the policy itself is the effective date. This is the date that interest begins to accrue. The issue date of the policy is June 15, 1989.

The issue before the Court is whether the policy was operable before the filing of the bankruptcy, or after the filing of the bankruptcy. Although the debtor attempted to shield his assets from his creditors by purchasing an annuity just minutes before he filed bankruptcy, the Court finds that this attempt failed. The policy itself was issued after the filing of bankruptcy with a retroactive date back to before the filing of the bankruptcy. The insurance company was not even sent a facsimile of the application or the check until 3:11 P.M. on June 13, 1989,

which was after the time of the filing of the bankruptcy. The check and application were delivered the next day, and the policy issued on June 15, 1989. The transfer did not occur until the check was honored by the bank, pursuant to the Uniform Commercial Code at Florida Statute Section 673.409; and In Re: Sims Office Supply, Inc., 18 B.C.D, 1006 (M.D. Fla. 1988). The Court finds that this is a post-petition transaction, avoidable by the Trustee pursuant to 11 U.S.C. §549.

In the alternative, the Court finds that the purchase of this annuity within minutes of the filing of the bankruptcy, was not permissible pre-bankruptcy planning, and was done with the intent to hinder, delay and defraud creditors. In the absence of other facts, the mere purchase of the annuity would not be fraudulent. In this particular case however, the ex-wife had attempted to reach the certificate of deposit in earlier proceedings before the State Court in the post-dissolution proceeding. In a State Court

proceeding on April 17, 1989, the debtor testified before the State Court that the certificate of deposit could not be reached until September, 1989. Yet, the debtor was able to reach these funds on the morning of his bankruptcy proceeding in order to purchase the annuity, which he has claimed as exempt in his bankruptcy proceeding. This transfer of non-exempt assets into an exempt annuity was a fraud with regard to the debtor's ex-wife and her attorneys who had been trying to reach this particular asset earlier. The funds used to purchase the annuity came from the sale of a business interest. The debtor was aware of pending litigation and testified he was insolvent. See In re: Gefen, 35 B.R. 368 (S.D. Fla. 1984). Therefore, the Court finds in the alternative that this was a fraudulent transfer pursuant to 11 U.S.C. §548, avoidable by the Trustee.

A separate Final Judgment of even date

has been entered in conformity herewith.

July 6, 1990

A. JAY CRISTOL

United States Bankruptcy Judge

****

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO: 89-22892-BKC-AJC

In Re THOMAS FRANCIS GEPFRICH, Debtor

ADV. NO. 89-0465-BKC-AJC-A

DANIEL L. BAKST, Trustee

v.

THOMAS FRANCIS GEPFRICH, Defendant

ORDER DETERMINING PLAINTIFF'S MOTION
TO ALTER OR AMEND FINAL JUDGMENT
Entered August 28, 1990

THIS MATTER Came On for hearing before the Court on August 6, 1990 on the Motion to Alter or Amend Final Judgment filed by Plaintiff Thomas Francis Gepfrich, and the

Court having considered argument of counsel, it is therefore

ORDERED by the Court as follows:

1. The Debtor's request in Paragraph 1 (PART I) of the aforementioned motion is granted; the Court will enter an amended final judgment separately adjudicating each of the Trustee's claims for relief against the Debtor in Counts I, II and II of the Trustee's Amended Complaint.

2. The Debtor's request in Paragraph 2 (PART I) that the Court amend the following statement that appears on the third and fourth pages of the Court's seven-page Findings of Fact and Conclusions of Law entered July 6, 1990, to-wit:

> There is a conflict in testimony of the debtor concerning the date that he first contacted Steve Eppel at Ambassador concerning a release of the lien on the certificate of deposit. In an affidavit filed With the Court to support his Motion for Summary Judgment, the debtor stated that he and Mr. Blum had already had informal discussions with Mr. Eppel long before the bankruptcy and that Eppel told the debtor and Blum in May 1989 that Ambassador would

> release the lien pledge whenever they wanted it. The debtor later recanted that testimony at the time of trial, which is also contrary to the testimony of Blum and Eppel. The Court has considered this inconsistent testimony in determining the credibility of Mr. Gepfrich, who waited until the second day of trial to change his testimony from that contained in an affidavit filed with the Court several months prior ....

be and the same, is hereby denied.

3. The Debtor's request in Paragraph 3 of PART II of said motion that the Court amend its Final Judgment so as to adjudicate each of the several claims for relief relating to denial of the Debtor's discharge (by reason of the fraudulent transfer within the year preceding bankruptcy) is granted; the Court will enter separate amended final judgments in favor of the Trustee and against the Debtor in Adversary No. 89-0465-BKC-AJC-A and in favor of Marjorie Lois Gepfrich and her attorneys and against the Debtor in Adversary No. 89-0433-BKC-AJC-A.

4. The Debtor's request in Paragraph 4 of PART II of said motion that the Court make

a Rule 54(b) determination is moot in vieW of the fact that (in the Amended Final Judgment being entered this day) the Court is fully adjudicating all claims for relief in both Adversary No: 89-0433-BKC-AJC-A and Adversary No: 89-0465-BKC-AJC-A, and therefore said request for a Rule 54(b) determination is hereby denied.

ORDERED at Miami, Florida this 28th day of August, 1990.

A. JAY CRISTOL
United States Bankruptcy Judge

****

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO: 89-22892-BKC-AJC

In Re THOMAS FRANCIS GEPFRICH, Debtor

ADV. NO. 89-0465-BKC-AJC-A

DANIEL L. BAKST, Trustee

v.

THOMAS FRANCIS GEPFRICH, Defendant

AMENDED FINAL JUDGMENT
Filed August 28, 1990

THE COURT having this day entered its Order Determining Plaintiff's Motion to Alter or Amend Final Judgment and in conformity with the Findings of Fact and Conclusions of Law entered by the Court July 6, 1990, it is therefore

ORDERED and ADJUDGED as follows:

1. With respect to Count I of the Trustee's amended complaint, judgment is hereby entered in favor of the Trustee, Daniel

L. Bakst and against Debtor/Defendant Thomas Francis Gepfrich and the Debtor, Thomas Francis Gepfrich, is denied a discharge of his debts pursuant to 11 U.S.C. Section 727(a)(2).

2. With respect to Count II of the Trustee's amended complaint, judgment is hereby entered in favor of the Trustee, Daniel L. Bakst and against Debtor/Defendant Thomas Francis Gepfrich. The Debtor's purchase of an annuity from First Colony Life Insurance Company in the amount of $49,012.09 is hereby avoided as a fraudulent transfer pursuant to 11 U.S.C. Section 548.

3. With respect to Count III of the Trustee's amended complaint, judgment is hereby entered in favor of the Trustee, Daniel L. Bakst and against Debtor/Defendant Thomas Francis Gepfrich. The Debtor's purchase of an annuity from First Colony Life Insurance Company in the amount of $49,012.09 is hereby avoided as a post-petition transfer pursuant to 11 U.S.C. Section 549.

4. The provisions of this amended final

judgment shall supersede the final judgment entered on July 6, 1990.

ORDERED at Miami, Florida this 28th day of August, 1990.

A. JAY CRISTOL

United States Bankruptcy Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 91-6398-CIV-GONZALEZ

In Re THOMAS FRANCIS GEPFRICH, Debtor

THOMAS FRANCIS GEPFRICH, Plaintiff/
Counterdefendant/Appellant,

v.

MARJORIE LOIS GEPFRICH, et al.,
Defendants/Counterplaintiffs/Appellees

THOMAS FRANCIS GEPFRICH,
Defendant/Appellant,

v.

DANIEL L. BAKST, TRUSTEE,
Plaintiff/Appellee

ORDER
Filed August 20, 1992

THIS CAUSE has come before the Court upon the debtor Thomas Francis Gepfrich's consolidated appeal from five appealable orders and judgments of the United States Bankruptcy Court for the Southern District of Florida. The parties have briefed the issues fully, and the Court heard argument of counsel on Friday, May 29, 1992. For the reasons explained below, the Court will affirm the orders and the judgments of the bankruptcy court.

Standard of Review

In considering an appeal from the United States Bankruptcy Court, this Court reviews the bankruptcy court's conclusions of law de novo. See In Re Sublett, 895 F.2d 1381, 1383 (11th Cir. 1990). Where an issue raises a mixed question of law and fact, the Court likewise will review the bankruptcy court's determinations de novo. In Re Mader, 108

Bankr. 643, 644 (N.D. Ill. 1989). However, this Court will not overturn the bankruptcy court's factual findings unless the Court determines that those findings are clearly erroneous. In Re Pepenella. 103 Bankr. 299, 300 (M.D. Fla. 1988).

Issues Presented

The debtor's consolidated appeal presents six questions:

> (1) Whether the bankruptcy court erred in determining that the debtor's annuity purchase was not completed until after he filed his bankruptcy petition?
>
> (2) Even if the debtor did complete the annuity purchase pre-petition, whether the bankruptcy court erred in determining that the purchase constituted a fraudulent transfer which justified a denial of the debtor's discharge?
>
> (3) If the bankruptcy court did err in invalidating the annuity purchase and in denying the discharge, whether the bankruptcy court also erred in dismissing the debtor's adversary complaint which sought to determine the dischargeability under 11 U.S.C. § 523(a)(5)(B) of the debtor,s obligation to pay his ex-wife a $270,000 equitable distribution award and his obligation to pay some $60,000 in attorney's fees to his ex-wife,s attorneys?

(4) Whether the bankruptcy court erred in entering a turnover order and a separate money judgment in the amount of $25,000 against the debtor and in favor of the trustee representing the debtor,s post-petition receipt of monies under his stock purchase agreement with Ambassador?

(5) Whether the bankruptcy court erred in excluding the testimony of Ambassador Vice-President Thomas Blake?

(6) Whether the bankruptcy court erred in denying the debtor's claim of exemption for wages in the amount of $922 where one of the objecting parties was the debtor's ex-wife who held a claim against the debtor for alimony?

The Court will address each issue separately.

Discussion

The debtor first claims that the bankruptcy court erred when it found that the debtor did not purchase the subject annuity until after the debtor filed his bankruptcy petition. It is unnecessary, however, for the Court to pass on this issue because even if the Court assumes the annuity was purchased pre-petition, the Court finds that the bankruptcy court correctly invalidated the annuity purchase and denied the debtor's

discharge on the ground that the purchase of the annuity constituted a fraudulent transfer under 11 U.S.C. §§ 548 and 727.

As a general rule, a debtor's conversion of non-exempt property into exempt property, in and of itself, will not work to deprive a debtor of an exemption to which the debtor otherwise would have been entitled. Norwest Bank Nebraska, N.A. v. Tveten, 848 F.2d 871, 873-74 (8th Cir. 1988). However, this rule is limited by the power of the bankruptcy court to deny a discharge if there is extrinsic evidence of the debtor's intent to defraud creditors. Id. at 874. Evidence that the debtor transferred property "with intent to hinder, delay, or defraud a creditor" within one year before the date of the filing of the petition will suffice to allow the Court to deny a discharge. See 11 U.S.C. § 727(a)(2). A bankruptcy court's finding that a debtor made a pre-petition transfer with the intent to hinder, delay, or defraud may be reversed only if clearly erroneous. McCormick v.

Security State Bank, 822 F.2d 806, 808 (8th Cir. 1987).

After careful consideration of the record and the arguments of the parties, the Court finds that the debtor has not demonstrated that the bankruptcy court's finding concerning the debtor's intent was clearly erroneous. Accordingly, this Court will affirm those orders and judgments of the bankruptcy court which invalidated the purchase of the annuity and denied the discharge. See In Re Reed, 700 F.2d 986 (5th Cir. 1983); Tveten, supra, 848 F.2d 871.

Because the Court will affirm the bankruptcy court's invalidation of the annuity purchase and the denial of the discharge, the Court further finds that the bankruptcy court did not err in dismissing as moot the debtor's adversary complaint-- which complaint sought to determine the dischargeability under 11 U.S.C. § 523(a)(5)(B) of the debtor's obligation to pay his ex-wife a $270,000 equitable distribution award and his

obligation to pay some $60,000 in attorney's fees to his ex-wife's attorneys.

Next, the debtor contends that the bankruptcy court erred in issuing a turnover order, and ultimately a separate money judgment, in the amount of $25,000 against the debtor and in favor of the trustee, representing the debtor,s post-petition receipt of monies under the stock purchase agreement he had entered into with Ambassador. After the debtor sold his Heritage stock to Ambassador in 1987 he received each month a salary of $5,000 under his employment contract and $3,080 per month pursuant to the 1987 stock purchase agreement. At issue are the monies received under the stock purchase agreement. The bankruptcy court characterized these monies as "stock purchase proceeds" and sustained the objection to the debtor's exemption. The debtor argues that this characterization was error. In response, the trustee contends that the subject monies were proceeds received from the sale of an asset

and therefore are property of the estate pursuant to 11 U.S.C. § 541.

The debtor has not persuaded the Court that the bankruptcy court erred in characterizing the subject monies as proceeds from the sale of the Heritage stock. Therefore, the Court finds that the bankruptcy court properly sustained the objection to the exemption and ordered the turnover of the $25,000. Additionally, the Court finds that the bankruptcy court did not commit reversible error when it sustained the objection to the testimony of Thomas Blank.

Finally, the debtor contends that the bankruptcy court erred in denying the debtor's claim that $922 of wages held in an ear-marked wage account at the time of bankruptcy was exempt. Wages are not exempt from creditors holding claims for alimony. See Fla. Stat. § 61.12. The debtor,s ex-wife, who obtained an alimony judgment against the debtor, objected to the exemption of the $922. Accordingly, the bankruptcy court correctly denied the

exemption as to the wage account.

Accordingly, having reviewed the record, and being otherwise duly advised, it is hereby:

ORDERED and ADJUDGED that the orders and judgments of the United States Bankruptcy Court for the Southern District of Florida, which orders and judgments were consolidated for the purposes of this appeal, are AFFIRMED.

DONE AND ORDERED in chambers at Fort Lauderdale, Florida, this 19th day of August, 1992.

JOSE A. GONZALEZ, JR.
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

CASE NO: 92-4858

In Re THOMAS FRANCIS GEPFRICH, Debtor

THOMAS FRANCIS GEPFRICH, Plaintiff-Counterclaim Defendant-Appellant,

v.

MARJORIE LOIS GEPFRICH, JAMES FOX MILLER, and MILLER & SCHWARTZ, P.A., a Florida Professional Service Corporation, Defendants-Counterclaim Plaintiffs-Appellees

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DANIEL L. BAKST, TRUSTEE, Plaintiff-Appellee

v.

THOMAS FRANCIS GEPFRICH, Defendant-Appellant,

v.

ORDER
Filed October 19, 1993

BEFORE: FAY and CARNES, Circuit Judges, and JOHNSON, Senior Circuit Judge.

PER CURIAM: AFFIRMED. See 11th Cir. Rule 36-

1....

Judgment Entered: October 19, 1993

For The Court: Miguel J. Cortez, Clerk
By: Karleen McNabb, Deputy Clerk

ISSUED AS MANDATE: December 8, 1993

ENTERED FOR THE COURT:

Ed Carnes
United States Circuit Judge

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IN THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

CASE NO: 92-4858

In Re THOMAS FRANCIS GEPFRICH, Debtor

THOMAS FRANCIS GEPFRICH, Plaintiff-Counterclaim Defendant-Appellant,

v.

MARJORIE LOIS GEPFRICH, JAMES FOX MILLER, and MILLER & SCHWARTZ, P.A., a Florida Professional Service Corporation, Defendants-Counter-claim Plaintiffs-Appellees

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DANIEL L. BAKST, TRUSTEE,
Plaintiff-Appellee

v.

THOMAS FRANCIS GEPFRICH,
Defendant-Appellant,
v.

ORDER
Filed November 30, 1993

ON PETITION FOR REHEARING

BEFORE: FAY and CARNES, Circuit Judges, and JOHNSON, Senior Circuit Judge.

PER CURIAM: The petition for rehearing filed by appellant Thomas Francis Gepfrich is DENIED.

ENTERED FOR THE COURT:

Ed Carnes
United States Circuit Judge

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TESTIMONY OF JOSEPH M. GUILLOTTI

In the Circuit Court of the
Seventeenth Judicial Circuit
In and For Broward County, Florida

Case No. 83-23375 CO (Price)

In Re the Marriage of

MARJORIE LOIS GEPFRICH, Petitioner/Wife,

and

THOMAS F. GEPFRICH, Respondent/Husband.

On April 20, 1989 before the Honorable J. Cail Lee, Circuit Judge, the following proceedings were had in the above-styled and number cause:

Appearances: Val Osinski, Esq., Coral Springs, Florida, for Petitioner/Wife

Gary Maisel, Esq.

for Respondent/Husband

PROCEEDINGS

* * *

JOSEPH M. GUILLOTTI, then called as a witness on behalf of Respondent/Husband being first duly sworn, was examined and testified on his oath as follows:

By Mr. Maisel:

Q Mr. Osinski mentioned there was a hundred thousand dollar C.D. remaining in Mr. Gepfrich's name and I believe Mr. (Blum's) name; are you with familiar with that?

A Yes, I am.

Q How did that C.D. come about?

A That's additional sale price on

the sale to Ambassador Savings and Loan ... I forget the terms, but at the end of two years if they didn't have to forfeit the money for, you know, the company losing money, not making money, I forget the exact terms, the money would be available to them.

Q Out of the hundred thousand dollars, if it is received, how much of that would be Mr. Gepfrich's?

A $50,000.

Q When is that due and owing?

A September, 1989.

Q Is that guaranteed that he will get the money or are there conditions upon receiving --

A No, there are conditions ....

* * *

Q And if he receives it at all it would be September, 1989?

A Yes. (Cir.Tr. 4/20/89, P 27, L 12-18, 23-25; P 28, 1-14, 24-25; P 29, L 1)

****

STATUTES INVOLVED

1. §222.11, Florida Statutes (Exemption of wages from garnishment):

> No writ of attachment or garnishment or other process shall issue from any of the courts of this state to attach or delay the payment of any money or other thing due to any person who is the head of a family residing in this state, when the money or other thing is due for the personal labor or services of such person. As used in this section, the term "head of family" includes any unmarried, divorced, legally separated, or widowed person who is providing more than one-half of the support for a child or other dependent. This exemption shall apply to any wages deposited in any bank account maintained by the debtor when said funds can be traced and properly identified as wages.

2. §222.14, Florida Statutes (Exemption of cash surrender value of life insurance policies and annuity contracts from legal process):

> The cash surrender values of life insurance policies issued upon the lives of citizens or residents of the state and the proceeds of annuity contracts issued to citizens or residents of the state, upon whatever form, shall not in any case be liable to attachment, garnishment or legal process in favor of any creditor of the person whose life is so insured or of any creditor of the person who is the beneficiary of such annuity contract, unless the

insurance policy or annuity contract was effected for the benefit of such creditor.

3. 11 U.S.C. §541 (Property of the estate):

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

* * *

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate except such as are earnings from services performed by an individual debtor after the commencement of the case.

* * *

4. 11 U.S.C. §548 (Fraudulent transfers and obligations):

(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily

(1) made such transfer or incurred such obligation with actual

intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

* * *

5. 11 U.S.C. §549 (Postpetition transactions):

(a) Except as provided in subsection (b) or in (c) of this section, the trustee may avoid a transfer of property of the estate -

(1) that occurs after the commencement of the case; and

* * *

6. 11 U.S.C. §727 (Discharge):

(a) The court shall grant the debtor a discharge, unless -

* * *

(2) The debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed -

(a) property of the debtor within one year before the date of the filing of the petition; or

* * *